#30.300 12/28/77

First Supplement to Memorandum 78-1

Subject: Study 30.300 - Guardianship-Conservatorship Revision (Comprehensive Statute--Major Portion)

We recently received a number of excellent comments from Judge Arthur K. Marshall of the Los Angeles County Superior Court on the guardianship-conservatorship draft which was considered by the Commission at the September and October 1977 meetings. A copy of Judge Marshall's letter is attached to the First Supplement to Memorandum 77-82 (powers of guardians and conservators) as Exhibit 4.

A number of the problems raised by Judge Marshall have been corrected or dealt with in the current draft. The word "uniform" has been changed to "uniformed" in the definition of "absentee" (now in proposed Section 1403). As revised, proposed Section 1460 (notice of hearing generally) now provides for notice to the ward if over the age of 12. Section 1464 (Section 1465 in the earlier draft) refers to proof of notice by "affidavit," but we refer in the Comment to Section 2015.5 of the Code of Civil Procedure to the effect that a declaration may be used in lieu of affidavit in many instances. In Section 1501 (appointment of special testamentary guardian), we have elevated from the Comment to the statute the statement that a testamentary guardianship under Section 1501 may coexist with a general guardianship. In Section 1601 (termination by court order), we have changed the language authorizing the court to terminate the guardianship when "no longer necessary or convenient" to when "it is in the ward's best interest to do so."

Judge Marshall's remaining points raise questions which should be considered further.

§ 1403. Absentee

As currently defined in proposed Section 1403 (Section 1414 in the prior draft), "absentee" refers to U.S. military personnel and other specified federal employees who have been administratively determined to be in "missing status" as defined under federal law. This definition is taken from existing Section 1751.5, which was enacted as part of legislation to provide relief to families of persons who were missing in action or prisoners of war in Southeast Asia. 1972 Cal. Stats., Ch. 988, §§ 9, 10.

Judge Marshall suggests that the definition be broadened to include missing persons generally. However, the two sets of provisions in the recommended legislation which use the defined term "absentee" are tailored to the P.O.W./M.I.A. situation. A conservator of the estate may be appointed for an "absentee" (proposed Section 1803), and in such a case the petition must set forth the proposed conservatee's last known military rank or grade (proposed Section 1841). Notice must be given to the appropriate U.S. agency (proposed Section 1842), and the official report of the absentee's status is given conclusive effect (proposed Section 1844).

Similarly, in Chapter 6 (proposed Sections 3500-3508) of Part 6 of the recommended legislation, a petition to set aside property to the absentee's family must set forth the absentee's last known military rank or grade, notice must be given to the appropriate U.S. agency, and the official report of the absentee's status is given conclusive effect.

Thus, to make these provisions applicable to missing persons generally, they would have to be completely redrafted which would destroy the original purpose of the legislation: to provide an expeditious procedure (based on the official determination of the federal authorities that the absentee is missing) for permitting the spouse of a P.O.W./M.I.A. to deal with property for the benefit of the family. Moreover, there are provisions in existing law for court appointment of a trustee, on petition, to administer the property of a California resident who has been missing 90 days or more. See Prob. Code §§ 260-272. Accordingly, the staff recommends that the definition of "absentee" in proposed Section 1403 not be broadened to include missing persons generally.

§ 1460. Notice of hearing generally

At the September 1977 meeting, the Commission was at first inclined to delete from the general notice provisions the requirement that notice of hearing be posted at the courthouse by the clerk (adapted from existing Section 1200), but ultimately decided not to do so at the urging of the Commission's consultant, Mr. Elmore. In Judge Marshall's view, the posting requirement is "archaic." And, as noted in the basic memorandum, posting has been held not constitutionally sufficient to give notice. Judge Marshall would prefer publication (not now required

generally and one specific publication requirement was deleted by the Commission--see subdivision (b) of proposed Section 1463) as a preferable means of notice to the entire world. Does the Commission wish to reconsider these two decisions? The staff recommends that the requirement of posting be eliminated, but we do not recommend that publication be required.

The Commission also decided in September to delete the staff-proposed requirement of notice to "adult relatives . . . within the second degree named in the petition . . . ." Instead, notice to such adult relatives is given only if special notice has been requested or if required by the particular provision. The staff believes the Commission decision is a sound one. Nevertheless, Judge Marshall recommends that notice be given to adult relatives within the second degree; however, Commissioner David Lee is generally opposed to expanding notice requirements (see Exhibit 1 to First Supplement to Memorandum 77-82). Does the Commission wish to reconsider this?

§ 1470. Definitions

In the transition provisions, the term "operative date" is defined to mean "the date this division becomes operative pursuant to Section 1471." Section 1471 provides, "This division becomes operative on July 1, 1980." Judge Marshall invokes the drafting rule generally employed by the Commission that a term should not be defined by using in the definition the very word being defined. However, the staff did not want to include the substantive provision (Section 1471) in the definition (Section 1470). The definition could have read: "'Operative date' means July 1, 1980," but then, if the operative date were changed, two sections would need to be revised instead of one as at present.

"Operative date" is the correct term here instead of "effective date." Under Article 4, Section 8, of the California Constitution, a statute enacted at a regular session shall go into "effect" on January 1 next following a 90-day period from the date of enactment. However, the statute may contain a provision delaying the operation of the statute to a specified date after its effective date. See 26 Ops. Cal. Att'y Gen. 141, 143-44 (1955). Proposed Section 1471 is such a provision.

§ 1500. Appointment of testamentary guardian by parent

§ 1501. Appointment of special testamentary guardian

Judge Marshall suggests that the lead line to proposed Section 1500 be revised to add the word "general" so that it will read: "Appointment of general testamentary guardian by parent." This seems sound, and the staff will make this change after the January meeting.

Judge Marshall also suggests that the terms "general" and "special" be added to the statute in proposed Sections 1500 and 1501. These terms are shorthand ways of distinguishing between the legal effect of an appointment made under Section 1500 (general) and one made under Section 1501 (special). However, the staff is of the view that to add these words to the statute would not change the legal effect of the sections, and the objective of assisting the practitioner to understand the distinction between these two sections is served by revising the lead line as suggested by Judge Marshall.

Finally, Judge Marshall is opposed to providing for testamentary appointment of a general guardian by a parent (proposed Section 1500) by deed or by signed writing. He believes that such an important step should be undertaken with the formality required for execution of a will. This issue has been discussed at length by the Commission, and the staff is satisfied with the present draft.

§ 1510. Petition for appointment or confirmation

§ 1514. Appointment or confirmation of guardian

Proposed Section 1510 requires a petition for appointment of a guardian to state that the appointment is "necessary or convenient." Similarly, proposed Section 1514 (Section 1515 in the prior draft) authorizes the court to appoint or confirm a guardian when it appears "necessary or convenient." Judge Marshall would delete the words "or convenient" from these two sections. However, these sections apply only to a minor. Because a minor in general lacks legal capacity, there will be occasions when guardianship will serve the minor's convenience, and the staff is of the view that the court ought to have broad discretion to determine when and whether a guardian for a minor should be appointed. Accordingly, the staff recommends that this language, adopted from existing law (see Section 1440), be continued.

§ 1515. No guardian of person for married minor

Judge Marshall suggests that, where a once-married minor is restored to unmarried status by dissolution or annulment, the minor should once again be subject to a guardianship of the person as well as of the estate. The addition of subdivision (b) to proposed Section 1515 (Section 1516 in the prior draft), done by the Commission at the September 1977 meeting ("Subdivision (a) does not apply in the case of a minor whose marriage has been adjudged a nullity"), takes care of half of Judge Marshall's problem. Does the Commission wish to reconsider the decision to treat a minor who has been married and divorced as no longer subject to a guardianship of the person (but subject to a conservatorship of the person if conservatorship standards are met)?

§ 1600. Majority, death, or marriage of ward

Judge Marshall suggests that a provision be added to subdivision (b) of proposed Section 1600 (guardianship of person terminates when ward marries) to make clear that, if the marriage is later annulled, the minor may once again be made subject to a guardianship of the person. The staff is of the view that this is the legal effect of proposed Section 1515(b) discussed above. However, it would be appropriate and helpful to add such a statement to the Comment to proposed Section 1600 as follows:

> If a minor's marriage is subsequently adjudged a nullity, the minor is once again subject to the appointment of a guardian of the person. See Section 1515.

§ 2652. Notice of hearing [on petition for removal of guardian or conservator]

Judge Marshall's final point concerns the inadvisability of the requirement under existing law of service of a citation on the ward or conservatee when proceedings are commenced to remove the guardian or conservator. See existing Sections 1580, 1951. Under proposed Section 2652, notice of hearing and a copy of the petition for removal of the guardian or conservator shall be mailed to the ward if over 12 or to the conservatee and to specified others, and shall be served on the guardian or conservator. The ward or conservatee may appear at the hearing (proposed Section 2653), but is not required to do so. Involvement of the

court investigator is not required. Cf. proposed Section 1852 (court may initiate removal proceedings based on information contained in court investigator's report or obtained from any other source). Thus, the current draft appears to resolve the problem raised by Judge Marshall.

Respectfully submitted,

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